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EDWARD BENNETT WILLIAMS (1920-1988)

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May 11, 2020

Via Email

Hon. Sarah Netburn
U.S. District Court for the Southern District of New York
Thurgood Marshall United States Courthouse
40 Foley Square
New York, NY 10007

Re: *Rich v. Fox News Network, LLC*, No. 18-cv-2223, Plaintiffs' Letter Brief in
Further Opposition to Pending Motions to Dismiss

Dear Judge Netburn:

Defendant Fox News Network, LLC writes in response to the letter submitted by Plaintiffs on May 6, 2020, seeking to "supplement" the factual record on two pending motions to dismiss, one by Fox News and the other by *pro se* defendant Ed Butowsky. Plaintiffs state that the purpose of their letter is to call to the Court's attention documents produced in discovery that supposedly support their position that these pending motions should be denied. In fact, the submission is nothing more than a "Hail Mary" aimed at saving their legally deficient claims by attempting to buttress them with materials outside the four-corners of their pleading. Plaintiffs' submission is procedurally improper, as it has been submitted long after the close of briefing and the pending Rule 12(b)(6) motion must be decided based on the allegations in the complaint alone. *Madu, Edozie & Madu, P.C. v. SocketWorks Ltd. Nigeria*, 265 F.R.D. 106, 122-23 (S.D.N.Y. 2010). It is also immaterial. The cited documents do nothing to support the concerted action claims against Fox News and only underscore that Plaintiffs have asked this Court to assert personal jurisdiction over Mr. Butowsky in a manner inconsistent with both Due Process and New York's long-arm statute.

I. Fox News's Motion to Dismiss Under Rule 12(b)(6)

Plaintiffs contend that the two exhibits attached to their letter show that Fox News and Butowsky engaged in "concerted action" and therefore provide a basis on which to deny Fox's Rule 12(b)(6) motion to dismiss their conspiracy and aiding and abetting claims. Letter Br. 2 n.3. This marks the second time Plaintiffs have sought to introduce documents

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outside the four corners of the complaint—they did so previously in their brief in opposition to Fox’s motion to dismiss, Dkt. No. 116, to which they attached several documents and deposition transcripts that their son, Aaron Rich, obtained in discovery in his separate case against Butowsky. This is of course improper. Federal courts “do not consider matters outside the pleadings in deciding a motion to dismiss for failure to state a claim.” *Nakahata v. New York-Presbyterian Healthcare Sys., Inc.*, 723 F.3d 192, 202 (2d Cir. 2013).

The cited documents also do nothing to salvage Plaintiffs’ concerted action claims. Though Plaintiffs baldly assert that the documents “refute Fox’s arguments for dismissal of Plaintiffs’ conspiracy and aiding abetting claims,” Letter Br. 2 n.3, they do not even attempt to articulate the relevance of the exhibits to the legal arguments actually raised by Fox. There is none. The cited documents are not even remotely germane to the legal deficiencies identified by Fox, including that: (1) the conspiracy claim cannot lie because it is entirely redundant of the underlying tort of intentional infliction, which itself is predicated on collective action; (2) the complaint fails plausibly to allege that Butowsky and Fox News shared a joint purpose to inflict emotional damage on the Rich family, as is required for the concerted action claims; and (3) no aiding and abetting liability can lie where there is no alleged “primary actor,” whose tortious conduct is knowingly aided and abetted. *See* Dkt. No. 103 at 19–22.

As they do not bear at all on the arguments actually advanced by Fox in the pending motion, Plaintiffs’ use of those documents can only be seen as an attempt to bolster their false narrative that Fox and Butowsky worked together “to propagate the sham story throughout 2017 even after the retraction.” Letter Br. 2.¹ But, if anything, these documents debunk that allegation. In fact, the first document indicates that Butowsky took a train from Washington, D.C. on May 22, 2017, in an effort to show text messages to Fox editors that might provide further support for the news article in question. As Plaintiffs acknowledge, however, Fox News retracted the article the very next day. Far from acting in concert with Butowsky, Fox News did the opposite of what he allegedly wanted. The second document is, if anything, even less helpful to Plaintiffs’ position. It shows that Butowsky sent an unsolicited email to a Fox News editor more than a month after the retraction—an email to which the editor never responded. Fox News was not acting together with Butowsky; it was ignoring him.

What is more, these documents constitute only a small sampling of Fox’s production to date and provide a highly selective and misleading account of the evidence—all the more reason it is improper for the Court to consider them on a motion under Rule 12(b)(6). Even as Plaintiffs argue that the evidence demonstrates concerted action, they conspicuously fail

¹ Plaintiffs cite paragraphs 111 through 117 of the amended complaint in support of their position that Fox and Butowsky together propagated a “sham” story for several months. However, those paragraphs concern Butowsky’s individual conduct only, none of which took place in New York.

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to notify the Court of another email in which Greg Wilson—the editor for the May 16, 2017, news article in question—stated that he *did not even know who Butowsky was* until after the article was published. *See* Ex. A, FoxNews0001149. They also neglect to inform the Court that [REDACTED]

[REDACTED] *See* Ex. B, FoxNews0000991. Plaintiffs have not attempted to explain how Fox News could have engaged in a conspiracy with Butowsky when its editors neither knew of him [REDACTED].

II. Butowsky's 12(b)(2) Motion

Plaintiffs further contend that these exhibits provide an additional basis on which to deny Butowsky's pending motion to dismiss for lack of personal jurisdiction. Although undersigned counsel does not represent Butowsky—and neither Fox nor its counsel has communicated with him regarding this response—counsel is compelled to note that Plaintiffs submitted their letter to the Court without serving Butowsky. Indeed, Plaintiffs apparently made no attempt to serve their supplemental letter brief on Butowsky until Fox News inquired whether they intended to do so.²

Butowsky's recent communications suggest, moreover, that he does not have the capacity to respond in light of his ongoing health issues. On March 27, Butowsky's counsel in the related Aaron Rich litigation informed the court that Butowsky continues to suffer significantly and face serious medical challenges that impairs his ability to participate in litigation and he has similarly advised counsel in this case.³

As an interested party in this litigation, Fox News notes that the theory of specific personal jurisdiction now evidently espoused by Plaintiffs cannot be squared with either the requirements of Due Process or New York's long-arm statute.

In order to exercise specific personal jurisdiction consistent with Due Process, the Court must find a **causal connection** between the defendant's in-forum contacts and the plaintiff's claims. *See SPV Osus Ltd. v. UBS AG*, 882 F.3d 333, 344 (2d Cir. 2018). Under Second Circuit precedent, the nature of that causal connection depends on the extent of the

² Plaintiffs responded that the Amended Stipulated Confidentiality Agreement and Protective Order barred them from sharing the letter brief and exhibits with Butowsky. Not so. Their submission references only a single document (Exhibit 1) that could not be shared with Mr. Butowsky without Fox's consent. Butowsky is the author of the other document (Exhibit 2) and therefore is permitted to view it under Paragraph 8(e) of the Order. In any event, Plaintiffs could have provided Butowsky a copy of their brief in redacted form or sought Fox's consent to share the Highly Confidential documents with Butowsky, which Fox would have given. Plaintiffs did neither.

³ *Rich v. Butowsky*, Case No. 1:18-cv-00681-RJL (D.D.C.), Dkt. No. 183; *Rich v. Fox*, Case No. 1:18-cv-2223 (S.D.N.Y.), Dkt. No. 142.

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defendant's connection to the forum. Where a defendant has limited case-related forum contacts, Due Process will permit the exercise of specific personal jurisdiction "only if the plaintiff's injury was proximately caused by those contacts." *Id.* Where the suit-related contacts are more extensive, "but for" causation may suffice—but, in all events, the plaintiff must demonstrate **a causal connection** between the defendant's contacts and the plaintiff's claim. *See id.*; *HDtracks.com, LLC v. 7digital Ltd.*, No. 18 CIV. 5823 (JFK), 2020 WL 582462, at *4 (S.D.N.Y. Feb. 6, 2020); *SPV Osus Ltd. v. UniCredit Bank Austria*, No. 18-CV-3497(AJN), 2019 WL 1438163, at *6 (S.D.N.Y. Mar. 30, 2019).

A causal connection—whether proximate or but for—is in fact required by nearly every federal Court of Appeals to have addressed the issue.⁴ On January 17, 2020, the Supreme Court granted certiorari in *Ford Motor Company v. Bandemer*, No. 19-369, to decide the question of what degree of causal connection between the nonresident defendant's forum contacts and the plaintiff's claims is required before a court may exercise specific personal jurisdiction over an individual defendant consistent with Due Process.⁵ That grant of certiorari follows on a number of recent Supreme Court decisions significantly tightening the grounds for exercising personal jurisdiction. *See, e.g., Bristol-Myers Squibb Co. v. Superior Court of Cal.*, 137 S. Ct. 1773, 1782 (2017) (holding that specific jurisdiction was not proper where all conduct giving rise to nonresidents' claims occurred outside the forum state); *Walden v. Fiore*, 571 U.S. 277, 288 (2014) (holding that "the mere fact that [defendant's out-of-state] conduct affected plaintiffs with connections to the forum State does not suffice to authorize jurisdiction"); *see also Daimler AG v. Bauman*, 571 U.S. 117, 139 (2014) (holding that a court may not exercise general jurisdiction over a foreign corporation based on the contacts of its in-forum subsidiary).

Regardless of whether specific jurisdiction here requires but-for causation or proximate cause, the theory embraced by Plaintiffs falls short. Indeed, the contacts relied upon by Plaintiffs have no causal connection to their alleged injury whatsoever. The asserted tort—consisting of an alleged scheme to plant Rod Wheeler as a source inside the Rich family in order to publish a "sham" story, Am. Compl. ¶ 36—was allegedly complete by the time Butowsky sent the emails on which Plaintiffs now rely. Even if Butowsky continued to contact Plaintiffs or publish tweets after that date, there is no allegation that any such activity took place in New York or had any nexus to New York whatsoever. Nor is there any allegation that Mr. Butowsky had any contact with or role in the statements of various guests on Fox News programs who are alleged to have mentioned Mr. Rich after

⁴ *See, e.g., Beydown v. Wataniya Rests. Holding, Q.S.C.*, 768 F.3d 499, 507–508 (6th Cir. 2014) (proximate cause); *Harlow v. Children's Hosp.*, 432 F.3d 50, 61 (1st Cir. 2005) (same); *Menken v. Emm*, 503 F.3d 1050, 1058 (9th Cir. 2007) (but for); *Waite v. All Acquisition Corp.*, 901 F.3d 1307, 1314 (11th Cir. 2018) (same); *Consulting Eng'rs Corp. v. Geometric Ltd.*, 561 F.3d 273, 278–279 (4th Cir. 2009) (same).

⁵ Argument was originally set for April 27, 2020. Due to the COVID-19 pandemic, it has been rescheduled for October Term 2020.

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the date of retraction. As such, it is clear that the grounds on which Plaintiffs urge the exercise of personal jurisdiction are incompatible with the requirements of Due Process.

Plaintiffs' contention is also incompatible with New York's long-arm requirements. Section 302(a)(1) of New York's long-arm statute requires that the "cause of action *aris[e] from*" the acts permitted to form a basis for personal jurisdiction—here an asserted "transact[ion] [of] business within the state." (emphasis added). To satisfy the "arising from" requirement, there must be an "articulable nexus" or "substantial relationship" between the business transaction and the claim asserted. *Licci v. Lebanese Canadian Bank*, 960 N.Y.S.2d 695, 702 (2012). Even putting aside whether Butowsky's cited contacts constituted a business transaction, the cause of action does not "aris[e] from" Mr. Butowsky's travel to New York after the publication of the story, and the day before retraction. Nor does it arise from his (unsuccessful) efforts more than a month after retraction to meet with a Fox News editor to present him with unknown information.

Fox News can only guess why Plaintiffs elected to bring their tort claims in New York. But having elected this forum, Plaintiffs must establish a basis for jurisdiction against each Defendant consistent with New York law and Due Process. Plaintiffs' submission only makes clear that they cannot do so with respect to Butowsky.

Respectfully,

/s/ Joseph M. Terry
Joseph M. Terry
Counsel for Fox News Network, LLC

cc: Counsel of record

EXHIBIT A

From: Wilson, Greg [Greg.wilson@FOXNEWS.COM]
Sent: 5/22/2017 6:40:00 PM
To: Kaplan, Refet [Refet.Kaplan@FOXNEWS.COM]
Subject: Butowsky

Who exactly is Ed Butowsky? He told me he is the guy who gave us the [REDACTED] story and that he is good friends with Moody. I have seen him on FBN, but that is all I know.

Greg Wilson
Deputy Managing Editor,
FoxNews.com

1211 Avenue of the Americas
New York, NY 10036

O: 212-301-5375
M: 917-592-7989
E: Greg.Wilson@FoxNews.com



EXHIBIT B

From: Refet.Kaplan@FOXNEWS.COM [Refet.Kaplan@FOXNEWS.COM]
Sent: 5/17/2017 3:10:01 AM
To: Wallace, Jay [jay.wallace@FOXNEWS.COM]
CC: Wilson, Greg [Greg.wilson@FOXNEWS.COM]; Sammon, Bill [bill.sammon@FOXNEWS.COM]; Lowell, Tom [Tom.Lowell@FOXNEWS.COM]
Subject: Re: FOXNews.com - Seth Rich

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

Sent from my iPhone

On May 16, 2017, at 9:24 PM, Kaplan, Refet <Refet.Kaplan@FOXNEWS.COM> wrote:

[REDACTED].

on this point of me standing by the story, Let me be very clear: i was asked earlier to respond to something wheeler had told another news organization, before we even knew what he said. I said I couldn't do that until we knew more. Wheeler wasn't responding. And he now appears to have sent very conflicting signals about what he knows, starting with the On cam interview w fox 5 D.C. And continuing through his appearances today.

Sent from my iPhone

On May 16, 2017, at 8:30 PM, Wallace, Jay <jay.wallace@FOXNEWS.COM> wrote:

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

Begin forwarded message:

From: "Jensen, Jessica" <Jessica.Jensen@FOXNEWS.COM>
Date: May 16, 2017 at 7:14:54 PM EDT
To: "Wallace, Jay" <jay.wallace@FOXNEWS.COM>
Cc: "Briganti, Irena" <Irena.Briganti@FOXNEWS.COM>
Subject: RE: FOXNews.com - Seth Rich

Hi Jay – please see below for the links to press coverage of FOXNews.com's report on Seth Rich that includes Rod Wheeler as its main source. We asked Refet if he wanted to respond, but he stood by the reporting.

Additionally, the CNN story I mentioned in my earlier email will be hitting later and we will send it to you when it publishes. Rod spoke to the reporter, Oliver Darcy, multiple times and gave him an on the record quote saying he got this "new" information that he used in the FOX 5 report directly from FOXNews.com reporter Malia Zimmerman and also that he never confirmed that there was an email exchange between Seth Rich and WikiLeaks independently.

Thanks,
Jessica

***Original Reports**

FOX News
<http://www.foxnews.com/politics/2017/05/16/slain-dnc-staffer-had-contact-with-wikileaks-investigator-says.html>

FOX 5
<http://www.fox5dc.com/news/local-news/254852337-story>

***Press Coverage**

Huffington Post
http://www.huffingtonpost.com/entry/fox-news-conspiracy-theory-wikileaks-seth-rich_us_591b493ee4b07d5f6ba6d027?xir

Heavy
<http://heavy.com/news/2017/05/seth-rich-wikileaks-contact-link-rod-wheeler-family-dnc-julian-assange-murder-conspiracy-theory/>

Wash Exam
<http://www.washingtonexaminer.com/murdered-dnc-staffer-seth-rich-had-sent-44000-internal-emails-to-wikileaks-report/article/2623186>

Daily Mail
<http://www.dailymail.co.uk/news/article-4509952/DNC-staffer-Seth-Rich-DID-links-Wikileaks.html>

NY Daily News
<http://www.nydailynews.com/news/crime/private-investigator-dnc-staffer-contacted-wikileaks-article-1.3169517>

WND

<http://www.wnd.com/2017/05/dead-dnc-staffer-had-contact-with-wikileaks/>

Business Insider

<http://www.businessinsider.com/seth-rich-family-right-wing-media-report-wikileaks-2017-5>

Breitbart

<http://www.breitbart.com/video/2017/05/15/report-investigator-says-evidence-showing-deceased-dnc-staffer-seth-rich-emailing-wikileaks/>

Raw Story

<https://www.rawstory.com/2017/05/family-blasts-right-wing-media-for-spreading-fake-news-story-about-slain-dnc-staffer-as-russia-scandal-deepens/>

NY Post

<http://nypost.com/2017/05/16/dnc-staffer-was-talking-to-wikileaks-before-his-murder-investigator/>

Mediaite

<http://www.mediaite.com/online/murdered-dnc-staffer-seth-rich-reportedly-had-contact-with-wikileaks/>

MRCTV

<http://www.mrctv.org/blog/murdered-dnc-staffer-reportedly-forwarded-emails-wikileaks-his-death>

The Hill

<http://thehill.com/homenews/news/333555-family-of-slain-dnc-staffer-slams-report-he-had-contact-with-wikileaks>

Buzzfeed

https://www.buzzfeed.com/alexcampbell/seth-rich-family-refutes-report?utm_term=.etrJPDO5D#.wj0QBPG5P

Washingtonian

<https://www.washingtonian.com/2017/05/16/everything-thats-weird-latest-seth-rich-story/>

Lifetzette

<https://www.lifetzette.com/polizette/murdered-dnc-staffer-reportedly-sent-40000-e-mails-wikileaks/>

Patch

<https://patch.com/district-columbia/washingtondc/seth-rich-bombshell-fake-news-heres-why>

ThnkProgress

<https://thinkprogress.org/fox-and-friends-seth-rich-coverage-denied-by-family-5ba8f018e02d>

Circa

<http://circa.com/politics/accountability/a-private-investigator-says-that-seth-rich-might-have-been-in-contact-with-wikileaks>

Infowars

<https://www.infowars.com/did-wash-post-publish-dubious-russia-story-to-distract-from-seth-rich-bombshell/>

Hollywood Life

<http://hollywoodlife.com/2017/05/16/seth-rich-contacted-wikileaks-dnc-employee-murdered/>

NBC

<http://www.nbcnews.com/politics/white-house/dnc-staffer-s-murder-draws-fresh-conspiracy-theories-n760186>

Inquisitr

<http://www.inquisitr.com/4223039/family-of-seth-rich-denounces-rod-wheeler-and-fox-news-for-pushing-conspiracies-surrounding-his-murder/>

Daily Caller

<http://dailycaller.com/2017/05/16/sources-seth-rich-was-in-contact-with-wikileaks/>

<http://dailycaller.com/2017/05/16/dc-mayor-says-allegations-of-cover-up-of-seth-rich-murder-are-preposterous/>

BizPac

<http://www.bizpacreview.com/2017/05/16/seth-rich-had-contact-with-wikileaks-as-murder-investigation-heats-up-491722>

DCist (FOX5)

<http://dcist.com/2017/05/fox-5-continues-its-shameful-report.php>

Mediaite

<https://medium.com/@newprogmedia/breaking-investigator-hired-by-murdered-dnc-staffer-seth-richs-family-says-there-s-evidence-of-7557664a3a5>

<https://medium.com/@caityjohnstone/theres-major-fuckery-afoot-with-the-washington-post-and-i-think-i-know-why-fc32e574d49f>

Barstool

<http://www.barstoolsports.com/boston/report-seth-rich-a-dnc-staffer-who-was-murdered-in-d-c-last-year-had-leaked-44000-emails-to-wikileaks/>

Heavy

<http://heavy.com/news/2017/05/rod-wheeler-seth-rich-fox-private-investigator-detective-wikileaks-washington-dc-bio/>

Buzzfeed

https://www.buzzfeed.com/josephbernstein/rod-wheeler?utm_term=.kj0vwo0Lo#.gweDz8XW8

WND

<http://www.wnd.com/2017/05/dead-dnc-staffer-had-contact-with-wikileaks/>

Jezebel

<http://theslot.jezebel.com/family-of-murdered-dnc-staffer-seth-rich-criticizes-fox-1795257292>

Salon

<http://www.salon.com/2017/05/16/fox-infowars-publish-debunked-conspiracy-about-murdered-dnc-staffer/>

Snopes

<http://www.snopes.com/seth-rich-dnc-wikileaks-murder/>

From: Jensen, Jessica
Sent: Tuesday, May 16, 2017 2:22 PM
To: Wallace, Jay
Subject: [FOXNews.com](http://www.foxnews.com) - Seth Rich

Hi Jay – I hope you are doing well. Please let me know when you have a couple minutes to discuss this dotcom report regarding Seth Rich. We have received several inquiries about the validity of this report. We spoke to a CNN reporter who is now telling us that our own contributor, Rod Wheeler, says the second paragraph of the article is inaccurate and that he is asking for a correction. Refet is currently in a meeting and I have not been able to reach him regarding whether Rod has contacted him or Malia for a correction. I spoke with Rod earlier and he said he wasn't responding to any press/doing any press other than FOX News, but that has obviously changed since he spoke directly with a reporter at a competing network.

<http://www.foxnews.com/politics/2017/05/16/slain-dnc-staffer-had-contact-with-wikileaks-investigator-says.html>

Thanks,
Jessica

Jessica Jensen
Manager, Media Relations | FOX News Channel
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